LIBRARY
SUPREME COURT, U. S.

FILED
JUL 19 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 91

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

JACK R. RICE, JR., City Attorney
JOHN S. LLOYD, Assistant City Attorney
65 S. W. First Street
Miami, Florida 33130
Attorneys for Respondent

TOPICAL INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCE INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT — JURISDICTION	3
CONSTITUTIONAL APPLICATION OF ORDINANCE	3
CONSTITUTIONALITY OF THE ORDINANCE	4
SUMMARY OF TESTIMONY	4-9
ARGUMENT	
QUESTION 1	9-11
QUESTION 2	11-20
QUESTION 3	20-21
CONCLUSION	21
CERTIFICATE OF SERVICE	22
APPENDIX OF RESPONDENT	App. 1-3

TABLE OF CITATIONS

Cases

Page

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 1 ..... 3, 12

A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed. 2d 809 18

Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed. 2d 584 18

Callendar v. State, Fla. 1966, 181 So.2d 529 10

Dresner v. City of Tallahassee, Fla. 1964, 164 So.2d 208 9

Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 ..... 18, 19

Ginzburg v. U. S., 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 17

Haile v. Gardner, 82 Fla. 355, 91 So. 376 19

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed. 2d 793 12

Marcus v. Search Warrants of Property, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 18

Roth v. United States, 354 U.S. 476, 77 S.Ct., 1304, 1 L.Ed. 2d 1498 ..... 4, 12, 15, 16, 17, 20, 21

Constitutional Provisions and Statutes

	Page
Illinois Criminal Code of 1961, Chapter 38, Section 11-2	2, 14
McKinney's Consolidated Laws of N. Y. Anno. Book 39, Part I, Section 690	2, 14
Section 4(2), Article V, Florida Constitution	2, 9
Sections 800.01, 800.02, Florida Statutes	2, 14
Title 9, Section 288A, Laws of California	2, 14
Title 10, Section 925, U. S. Code	2, 14
Title 18, Section 1461, U. S. Code	20
Title 28, Section 1257(3), U. S. Code	2, 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. _____

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

OPINIONS BELOW

Petitioner has correctly set forth the facts concerning the opinions below.

JURISDICTION

We disagree with petitioner's contention that neither appeal nor certiorari lies to the Supreme Court of Florida.

Further discussion by respondent will be undertaken

in its argument with respect to the question concerning the jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCE INVOLVED.

Petitioner has set forth in his brief and appendix Chapter 43, section 38 of The City of Miami Code and Section 847.011, Florida Statutes, the Florida obscenity statute, the violation of which is made a violation of the Miami City Code.

Respondent refers in its brief to the following constitutional provision and statutes and has set forth their pertinent texts in a supplemental appendix.

Title 28, Section 1257(3) U. S. Code, Title 10, Section 925, U. S. Code, Section 4(2), Article V, Florida Constitution, Sections 800.01 and 800.02, Florida Statutes, McKinney's Consolidated Laws of New York, Anno. Book 39, Part I, Section 690, Illinois Criminal Code of 1961, Chapter 38, Section 11-2, Title 9, Section 288A, Laws of California.

QUESTIONS PRESENTED

I WHETHER OR NOT THIS COURT HAS JURISDICTION TO ENTERTAIN THIS PETITION.

II WHETHER OR NOT THE ORDINANCE IN QUESTION WAS UNCONSTITUTIONALLY APPLIED TO PETITIONER.

III WHETHER OR NOT THE ORDINANCE IN QUESTION IS UNCONSTITUTIONAL.

STATEMENT OF THE CASE

Respondent generally agrees with the content of petitioner's Statement of the Case taking exception, however, to one or two argumentative conclusions.

SUMMARY OF ARGUMENT

JURISDICTION

This Court does not have jurisdiction to entertain the petition for writ of certiorari because petitioner has failed to exhaust his Florida appellate remedies.

A decision of a District Court of Appeal in Florida is reviewable on certiorari granted by the Florida Supreme Court in the event such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeal. To this extent, complete exhaustion of Florida's appellate processes would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court.

CONSTITUTIONAL APPLICATION OF ORDINANCE

The ordinance was not unconstitutionally applied to petitioner. The statues meet the test of obscenity enunciated by this Court in the Fanny Hill case. **A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts** (Fanny Hill case), 383 U.S.413, 86 S. Ct. 975, 16 Law Ed. 2d 1.

State laws forbid the type of unnatural sex acts portrayed by the statues. Where such unnatural acts constitute crimes of moral turpitude in the United States, their public portrayal by means of statues must be an affront to contemporary community standards.

Testimony of petitioner's own witnesses to the effect that the statues could tend to influence the sex urge of not only adults but children prove they appeal to a prurient interest in sex. The crudely constructed statues, themselves, clearly indicate no redeeming social value.

The statues were not unconstitutionally seized and confiscated. The decisions below upholding the seizure are not in conflict with this court's decisions.

CONSTITUTIONALITY OF THE ORDINANCE

The ordinance involved is constitutional. The Florida obscenity statute, the violation of which is made a violation of respondent's ordinance, is actually more explicit than either the Federal obscenity statute or the California obscenity statute, both of which were upheld as constitutional by this Court in the Roth case. **Roth v. United States**, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498.

SUMMARY OF TESTIMONY

Petitioner has presented a biased and argumentative summary of evidence containing some misleading quotations out of context. Further, petitioner in his brief on page 12 seems to have inadvertently misquoted a Professor Massin and cites transcript page numbers which do not

include testimony by Professor Massin. Respondent, therefore, presents its own summary of the testimony.

Two police officers, Sergeant Quinn and Officer Matta, testified on behalf of respondent.

Sergeant Quinn testified as follows:

He arrested the petitioner, MARCEL FORT, on August 11, 1965, near the intersection of South Dixie Highway and Bridgeport Avenue in the City of Miami (Tr 17). Six statues were exhibited on the lawn of petitioner's property so that they were exposed to the very busy highway with two signs offering the objects for sale (Tr 18,20,21).

The objects on petitioner's lawn indicated or represented the following:

1. A sexual practice known as "six nine" in which a female figure was held upside down by a male with the mouth of the male by the sexual organ of the female and vice versa (Tr 22; Exhibit 2).

2. A female kneeling down with the mouth on the male sexual organ (Tr 24; Exhibit 3).

3. A male holding a female with her legs spread with the male between the legs of the female in an obvious situation of sexual relations (Tr 25; Exhibit 4).

4. A crudely made statue in two colors—black and white — exhibiting the private parts — pubic hairs — of a female (Tr 26; Exhibit 5).

5. A male and female with the anterior portion of the male's middle pressed against the posterior portion of the female's middle. The female's hand was to the right of the male's neck and the male's left hand was between the legs of the female (Tr 27; Exhibit 6).

6. A female upside down with her legs spread and a man kneeling behind her with his head from the rear to the private parts of the female (Tr 27; Exhibit 7).

All of the objects or statues were life-size and could easily be seen from the highway (Tr 27-28). They were pornographic and Sergeant Quinn "ran off" some little girls for that reason (Tr 22). It was obvious to anyone who looked at them what the statues represented (Tr 35).

There were complaints about the statues (Tr 45).

Officer Matta testified as follows:

The statues represented human figures — male and female — in contact with one another in a sexual relation of sorts (Tr 56). From the attitude of people and the positions of the statues, they were obscene (Tr 60).

The figures appeared to be nude and the statues were made of fiberglas (Tr 67,70).

Besides himself, petitioner presented three witnesses.

Eugene Massin, Associate Professor of Art, at the University of Miami testified as follows:

He was familiar with erotic art (Tr 81). He did not

agree that there should be a law against pornography and did not know what pornography was (Tr 95). No art can be pornographic (Tr 85). The statues were a series of designs which were a part of an art form (Tr 87).

Jack Painter, Professor of Philosophy at the University of Miami testified as follows:

He could not specify whether the figures were in a certain act of intercourse but obviously saw human bodies in contact with one another and there was a sexual theme (Tr 107).

From certain structural problems he would not say that these works were entirely successful but would say they were competent works of art (Tr 108).

He had seen billboards that were highly suggestive and the front ends of cars that looked like vaginas. He had seen a car with a vagina in front (Tr 115).

He was not an authority on the average cross-section of Miami (Tr 119).

Dr. J. A. Kapchan, Associate Professor of Social Science and Psychology and a practicing clinical psychologist, testified as follows:

Clinical psychology deals with diagnosis of abnormal behavior, marital problems and problems of personality maladjustment (Tr 126).

Certain large cars like Cadillacs might unconsciously mean penis to people, and hardtop convertibles might have

homosexual reference (Tr 132). The six statues (Exhibits 2 through 7) were not obscene. With reference to the statues, when Dr. Kapchan first saw them he did not see sexual themes at all. Only when he was asked to look more closely and some of the things were pointed out to him by Mr. Fort (petitioner) could he see the various sex themes. In referring to Exhibit 7, he felt "that thing there was a penis that had lost its erection." (Tr 133)

Dr. Kapchan would like to sit down and see if he could not use some of petitioner's techniques as a diagnostic aid. On this basis it had social importance, potentially (Tr 137). He would rather see a "voyeur" looking at the statues than peeping in somebody's window at night (Tr 137).

The statues could tend to influence the sex urge of not only adults but children (Tr 141). The statues would have an effect on a teenager or even a younger person viewing them (Tr 141).

On the subject of signs with a good looking bathing beauty and a coca cola bottle on the same sign, "the mass motivation people might tell you the coca cola bottle is a penis." (Tr 144).

An erotic desire means a sexual desire and all people have sexual desires (Tr 144).

Petitioner, MARCEL FORT, testified as follows:

He was influenced by the book KAMA KALA, by Rodin, Picasso, many artists in New York and France, and very erotic sculpture in Italy (Tr 154).

He was the creator of Exhibits 2 through 7 (Tr 154-155). The exhibits were made in fiberglas (Tr 155). He had a sign advertising contemporary art (Tr 157).

When he made the structures he intended to symbolize the emotion of love. It was his contention that they would promote love and felt that was normal love (Tr 159).

ARGUMENT

QUESTION I

This court does not have jurisdiction to entertain this petition.

Petitioner seeks review by this Court by virtue of the provisions of Title 28, Section 1257(3), United States Code.

The judgment, however, which he seeks to have reviewed was not rendered by the highest court of this State in which a decision could be had. See Section 4(2), Article V, Florida Constitution; **Dresner v. City of Tallahassee**, Fla. 1964, 164 So.2d 208.

In **Dresner v. City of Tallahassee**, supra, this Court certified certain questions to the Supreme Court of Florida with respect to the jurisdiction of Florida appellate courts.

The Florida Supreme Court observed that a decision of a District Court of Appeal is reviewable on certiorari granted by the Florida Supreme Court in the event that such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District

Court of Appeal or if the decision initially construes a controlling provision of the state or federal constitution or initially passes upon the validity of a state or federal statute or treaty. The Florida Supreme Court then stated as follows:

> "To this extent complete exhaustion of Florida's appellate processes would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked."

Petitioner, however, did not apply to the Supreme Court of Florida for a writ of certiorari.

As the Florida Supreme Court pointed out in Dresner, the affirming judgment of a circuit court did not construe but merely applied federal constitutional questions. Thus, there would be no possibility for review by certiorari on the basis that the instant District Court of Appeal decision construed a controlling provision of the state or federal constitution.

The question as to whether there is or is not a conflict between the instant decision and a decision of another District Court of Appeal or of the Florida Supreme Court is, however, left open.

We are familiar with the opinion of the Florida Supreme Court in **Callendar v. State**, Fla. 1966, 181 So.2d 529, in which the court remarked that the appellants who had sought review of a District Court of Appeal decision by the Florida Supreme Court had gone too far in the

Florida courts before seeking relief in the federal Supreme Court.

In Callendar, however, the Florida Supreme Court had, *ex mero motu*, dismissed an appeal by the appellants. Thus, the question of the finality of the District Court of Appeal decision had been determined.

In the instant case, the question of whether petitioner would be entitled to review by the Florida Supreme Court remains unanswered, and, therefore, there is a probability existing that the District Court of Appeal is **not** the highest court in which a decision could be had.

Absent a clear showing by petitioner that he is not entitled to a review by certiorari by the Florida Supreme Court, he cannot show that which he must show — that the District Court of Appeal is the highest court in which a decision could be had in the case at bar.

Petitioner could have sought review of the District Court of Appeal decision by filing a petition for writ of certiorari in the Florida Supreme Court. He did not, and thus failed to exhaust his Florida appellate remedies before applying to this court for relief.

QUESTION II

The ordinance in question was not unconstitutionally applied to petitioner.

1. Concerning petitioner's Question 1.

Petitioner contends the decisions below regarding

the obscenity of his statues conflict with the required tests for determining obscenity as set forth in **Roth v. United States**, supra, **Jacobellis v. Ohio**, 378 U.S. 184, 84 S. Ct. 1676, 12 Law. Ed. 2d 793, and **A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Com. of Massachusetts**, supra.

This contention is erroneous. None of the above three cases pertains to statues publicly displayed near a busy highway. The **Roth** and **Fanny Hill** cases deal with books. **Jacobellis** deals with a motion picture.

Books and motion pictures; of course, may be read or viewed at the option of the public. The statues in question were on public display for all to see. Even if we accept the argument, however, that the test in **Fanny Hill** must be applied the statues meet this test.

Does the dominant theme of the material as a whole appeal to a prurient interest in sex?

The statues themselves are the best evidence to prove this element. They portray various abnormal and unnatural sex practices such as "six nine," oral copulation and anal intercourse (buggery) (Tr 22). One of the statues is painted white with a patch of black paint between the legs of the female figure.

The prurient interest appeal was further proved by witnesses for petitioner. One of petitioner's witnesses admitted he obviously saw human bodies in contact with one another and there was a sexual theme. Another witness, the clinical psychologist, admitted that the statues could tend to influence the sex urge of not only adults but

children and that they would have an effect on a teenager or even a younger person viewing them (Tr 141). Petitioner, himself, testified that he intended by the structures to symbolize the emotion of love. It was his contention they would promote love. Petitioner felt that was normal love (Tr 159).

The most obvious admission of an appeal to a prurient interest in sex was made by the clinical psychologist, Dr. Kapchan, when he stated:

> "I would much rather see a voyeur looking at these statues than peeping in somebody's window at night." (Tr 137)

Is the material patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters?

Petitioner's own counsel on cross examination of Sergeant Quinn elicited the fact that there were complaints about the statues (Tr 45). Officer Matta testified that he felt the statues were obscene because of the attitude of people and the positions of the statues (Tr 60).

Accepting the principle that the contemporary community standard is a national standard, we submit that a perusal of the laws of all fifty states will reflect that each one has laws proscribing the type of sexual practices portrayed by the statues.

Three of the most populous states in the United States, New York, California and Illinois, have laws which

describe with particularity the unnatural and abnormal sex relations portrayed by the statues and forbid such acts.

For instance, a New York statute makes a person who carnally knows any male or female person by the anus or by or with the mouth guilty of sodomy and makes the crime punishable with imprisonment for not more than twenty years. McKinney's Consolidated Laws of New York, Anno. Book 39 Part I, Section 690.

An Illinois statute describes deviate sexual conduct as meaning any act of sexual gratification involving the sex organs of one person and the mouth or anus of another. Illinois Criminal Code of 1961, Chapter 38, Section 11-2.

A California statute provides that any person participating in an act of copulating the mouth of one person with the sexual organ of another may be punished by imprisonment in the state prison for a period not exceeding fifteen years. Title 9, Section 288A, Laws of California.

General military law provides that unnatural, carnal copulation with another person of the same or opposite sex is sodomy. Title 10, Section 925, United States Code.

Florida law prohibits crimes against nature and unnatural and lascivious acts with other persons. Section 800.01 and 800.02, Florida Statutes.

Thus, both the National Congress and various state legislatures, in representing the American public, have made it a crime to engage in the unnatural sex acts portrayed by the statues involved.

OBVIOUSLY, IF SUCH UNNATURAL ACTS CONSTITUTE CRIMES OF MORAL TURPITUDE THEIR PUBLIC PORTRAYAL BY MEANS OF STATUES MUST BE AN AFFRONT TO CONTEMPORARY COMMUNITY STANDARDS.

This court, in **Roth v. United States**, supra, notes the fact of obscenity laws throughout the world by stating as follows:

> ". . . but implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in a universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1856."

Is the material utterly without redeeming social value?

Once again, we refer to the statues. They are crudely constructed in fiberglas. Petitioner's own witness admitted the statues were not entirely successful from certain structural problems (Tr 108).

The extremely crude application of the fiberglas by petitioner clearly indicates he was interested only in obscenity. How can such crudeness have any redeeming social value? The statues are merely obscene.

In his brief, petitioner attempts to contend there

was expert testimony to the effect that the statues had some social importance. Such, however, is not the case. Only one of petitioner's witnesses, the clinical psychologist, even discussed social importance. The psychologist, however, appeared to be discussing not the statues but petitioner's techniques of drawing as a diagnostic aid. Even then the psychologist only agreed that this had social importance "potentially." (Tr 137)

Indeed, it is clearly apparent from the testimony of the psychologist that he was greatly interested in petitioner himself as a subject of clinical interest for study.

This court, by its decision in **Roth v. United States**, supra, makes it crystal clear that the trial court as a finder of fact in this case was the exclusive judge regarding the common conscience of the community and capable of determining the obscenity or otherwise and the redeeming social value or otherwise of the statues without the assistance of so-called expert testimony.

Petitioner apparently contends that children must be excluded from consideration in the establishment of the elements involved to determine the appeal of the statues to prurient interest.

Such is not the case. This court in **Roth v. United States**, supra, clearly held, by approval of an instruction to the jury by the lower court, that the test was the effect of the book, picture or publication considered as a whole not upon any particular class but upon all those it was likely to reach. To be considered was the community as a whole, young and old, educated and uneducated, religious and irreligious, men, women and children.

Thus, the testimony of the police officers concerning their own feelings, and concerning the feelings exhibited by the fact of complaints of others, is a far better test to meet the doctrine enunciated in the **Roth** case than the testimony of three college professors, two of which did not even pretend to be authorities on any community standards. The third college professor, who made some pretense at being an authority, was a clinical psychologist dealing with abnormal persons. He admitted the statues would influence the sex urge of adults, teenagers and children. We submit that college professors ensconced in the ivory towers of such sparsely populated classrooms as those of art and philosophy are not qualified to judge the conscience of the community as a whole.

Concerning petitioner's contention that the trial court's finding of guilty was based on an erroneous legal conclusion, we need only to quote the following from this court's opinion in **Ginzburg v. United States**, 383 U. S. 463, 86 S.Ct. 942, 16 L. Ed. 2d 31:

> "We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise."

The public display of the statues was the culmination of the offense.

2. Concerning Petitioner's Question 3.

Petitioner contends the decisions below upholding

what he terms seizure and confiscation of his statues with no warrant or judicial adversary proceeding to determine the issue of obscenity conflict with this court's decision in **Marcus v. Search Warrants of Property**, 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127, **A Quantity of Copies of Books v. Kansas**, 378 U.S. 205, 84 S. Ct.1723, 12 L. Ed. 2d 809, **Freedman v. Maryland**, 380 U.S.51, 85 S. Ct.734, 13 L. Ed. 2d 649, and **Bantam Books v. Sullivan**, 372 U.S. 58, 83 S. Ct.631, 9 L.Ed. 2d 584. This is an erroneous contention.

All of these cases cited by petitioner except **Freedman** deal with publications and firms distributing books and magazines. **Freedman** is concerned with exhibition of movie films. In **Marcus**, a Missouri law authorized a search for and seizure of allegedly obscene publications by a warrant issued on the basis of a sworn complaint filed with a judge or magistrate in an ex parte proceeding. Following the issuance of such a warrant, Missouri officers seized all magazines in the establishment of a news distributor, not confining themselves to the original list of publications on which the warrant issued. The distributor's stock of magazines ran into hundreds of thousands of copies.

In the case of **A Quantity of Copies of Books v. Kansas**, supra, under somewhat similar circumstances, 1,715 books were seized by the sheriff pursuant to a warrant issued on the basis of a Kansas statute authorizing seizure of allegedly obscene books before an adversary determination of their obscenity.

In **Bantam Books v. Sullivan**, supra, the Rhode Island Legislature created a commission to encourage morality in youth and gave the commission, *inter alia*, the duty to investigate and recommend prosecution of violations of

sections of the Act which were concerned with obscene literature.

In **Freedman v. Maryland**, supra, a state statute required prior submission of movie film for review by a censorship board before public exhibition.

Obviously, the facts in the above cases are so dissimilar to the facts in the case at bar that the rationale in these cases cannot be applied here. In two of the above cases, entire stocks of certain publications were taken from distributors, without an arrest and before an adversary judicial proceeding as to their obscenity had been held.

The acquisition of samples of each allegedly obscene publication would have been sufficient for judicial determination in these cases. Thus, it was simply not necessary to confiscate all of the material at the time it was done.

In the instant case, however, there were only six statues, all of which were required for use as evidence against petitioner and were used for that purpose.

Inasmuch as petitioner was lawfully arrested, the arresting officer was authorized to seize the statues involved in the charge against petitioner. See **Haile v. Gardner**, 82 Fla. 355, 91 So. 376, 378. The seizure of the statues was an incident to a lawful arrest, and all the statues were introduced into evidence.

In the cases cited by petitioner, there were no arrests involved with respect to the seizure of the publications, simply a seizure—unnecessary for evidence purposes—of large numbers of books and magazines.

There is simply no correlation between the above cases and the situation in the case at bar.

QUESTION III

The ordinance in question is constitutional.

1. As to petitioner's Question 2.

Petitioner contends that the City of Miami ordinance involved is unconstitutional on its face under the Fourteenth Amendment with reference to the limited "appeal of prurient interest" test for determining obscenity.

Petitioner cannot be serious in this contention.

The Florida obscenity statute, which is adopted by reference by respondent's ordinance, contains terms substantially similar to the terms used in the Federal Obscenity Statute (18 U. S. Code Sec. 1461) the constitutionality of which has been upheld by this Court in **Roth v. United States**, supra.

Further, the Florida statute actually quotes the test enunciated by this Court in **Roth** for the determination of obscenity. Obviously, therefore, the statute cannot conflict with this Court's opinion in **Roth v. United States**, supra.

What petitioner apparently wants is a statute containing all of the tests ever suggested by this Court in all of the obscenity cases in which it has given opinions.

The Florida statute is actually more explicit than either the Federal Obscenity Statute or the California

Obscenity Statute, both of which were upheld as constitutional by this Court in **Roth.**

The following excerpt from this court's opinion in **Roth v. United States,** supra, is apropos:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. The constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JACK R. RICE, JR., City Attorney
JOHN S. LLOYD, Assistant City Attorney
65 S. W. First Street
Miami, Florida 33130

By John S. Lloyd
Attorneys for Respondent

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been hand delivered to IRMA ROBBINS FEDER, RICHARD YALE FEDER, Attorneys for Petitioner, c/o ACLU of Florida, 312 Biscayne Building, Miami, Florida 33130, and to JOSEPH C. SEGOR, Attorney for Petitioner, 395 N. W. 1st Street, Miami, Florida, this 18 day of July, 1967.

JACK R. RICE, JR., City Attorney
JOHN S. LLOYD, Assistant City Attorney

By John S. Lloyd
Attorneys for Respondent

APPENDIX TO BRIEF OF RESPONDENT

UNITED STATES CODE

Title 10, Section 925. Art. 125. Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Title 28, Section 1257. State courts; appeal; certiorari

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

FLORIDA CONSTITUTION

Article V, Section 4 (2)

... Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute

or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

FLORIDA STATUTES

800.01 Crime against nature; punishment.

—Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years.

800.02 Unnatural and lascivious act.

—Whoever commits any unnatural and lascivious act with another person shall be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months.

CITATIONS OF NEW YORK, ILLINOIS AND CALIFORNIA

New York McKinneys Consolidated Laws of N. Y. Anno. Book 39, Part 1, Sec. 690

A person who carnally knows in any manner any animal or bird; or carnally any male or female person by the anus or by or with the mouth; or voluntarily submits to such carnal knowledge; or attempts sexual intercourse with a dead body, is guilty of sodomy and is punishable with imprisonment for not more than twenty years.

Illinois Criminal Code of 1961, Chapter 38 Sec. 11-2

Deviate sexual conduct for the purpose of this Article means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.

California Title 9, Laws of California

Sec. 288A. Perversion; copulation with mouth; punishment

Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the State Prison for not exceeding 15 years....